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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 TWYLA WENTWORTH,
10 Plaintiff,

11 v.
12 NANCY A. BERRYHILL, Deputy
13 Commissioner of Social Security for
14 Operations,
15 Defendant.

16 CASE NO. 3:17-CV-05748-JRC

17 ORDER ON PLAINTIFF'S
18 COMPLAINT

19 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
20 Local Magistrate Judge Rule MJR 13 (*see also* Consent to Proceed before a United States
21 Magistrate Judge, Dkt. 2). This matter has been fully briefed. *See* Dkts. 9, 10.

22 After considering and reviewing the record, the Court concludes that the
23 Administrative Law Judge (“ALJ”) did not commit harmful legal error during the
24 evaluation of plaintiff’s Social Security claim. Although plaintiff contends that the ALJ
 erred in failing to identify her depression and anxiety as severe, plaintiff failed to show

1 that her depression and anxiety would impair her ability to function under the limitations
2 included the ALJ's residual functional capacity ("RFC").

3 Similarly, although plaintiff argues that the ALJ erred when evaluating the
4 medical evidence, therapist Frances Jean Corn, MSW (Masters in Social Work), did not
5 opine that plaintiff's symptoms translated into functional limitations or impacted
6 plaintiff's ability to maintain or obtain employment. Thus, any error by the ALJ was
7 harmless.

8 In addition, there are inconsistencies and conflicts between plaintiff's testimony at
9 her hearing about her limitations, and the statements and reports throughout the medical
10 record regarding her activities and abilities. These reasons alone provide clear and
11 convincing rationale supported by substantial evidence in the record for the ALJ's failure
12 to credit fully plaintiff's allegations. Therefore, although the ALJ erred in his reliance on
13 plaintiff's minimal mental health treatment and plaintiff's unemployment history to
14 support the credibility determination, any such error is harmless.

16 Accordingly, the Court orders that this matter be affirmed pursuant to sentence
17 four of 42 U.S.C. § 405(g).

18 BACKGROUND

19 Plaintiff, TWYLA WENTWORTH, was born in 1954 and was 58 years old on the
20 alleged date of disability onset of June 30, 2012. *See AR. 140-41.* Plaintiff has a
21 bachelor's degree in Health Education. AR 37. Plaintiff has work history as fiduciary at
22 a trust organization. AR. 45. She left her last employment following an unsuccessful
23 three-month probationary period. AR. 38-39.

According to the ALJ, plaintiff has at least the severe impairments of “migraine headaches 20(CFR 404.1520(c)).” AR. 17.

At the time of the hearing, plaintiff was living alone in a duplex. AR. 37.

PROCEDURAL HISTORY

Plaintiff's application for disability insurance benefits ("DIB") pursuant to 42 U.S.C. § 423 (Title II) of the Social Security Act was denied initially and following reconsideration. *See* AR. 49, 58. Plaintiff's requested hearing was held before ALJ Gary Elliott on April 21, 2016. *See* AR. 32-48. On May 9, 2016, the ALJ issued a written decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act. *See* AR. 12-31.

In plaintiff's Opening Brief, plaintiff raises the following issues: (1) the ALJ erred in failing to identify plaintiff's depression and anxiety as severe; (2) the RFC is flawed for failing to consider all of plaintiff's impairments; (3) the ALJ erred in evaluating plaintiff's subjective symptom testimony by relying on plaintiff's unsuccessful work attempt; and (4) the ALJ erred in evaluating the opinion evidence specifically by giving great weight to the opinion of a one-time examiner and little weight to that of a treating provider. *See* Dkt. 9 at 2.

STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d

1 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
2 1999)).

3 DISCUSSION

4 **(1) Whether the ALJ erred in failing to identify plaintiff's depression and
5 anxiety as severe and considering these impairments in the RFC.**

6 Plaintiff first argues that the ALJ erred by failing to find her depression and
7 anxiety a severe impairment at Step Two and that the RFC is flawed for failing to
8 consider all of plaintiff's impairments. Dkt. 9 at 4-7.

9 Step Two of the administration's evaluation process requires the ALJ to determine
10 whether the claimant "has a medically severe impairment or combination of
11 impairments." *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted);
12 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). An impairment is "not severe"
13 if it does not "significantly limit" the ability to conduct basic work activities. 20 C.F.R.
14 §§ 404.1521(a), 416.921(a). "Basic work activities are 'abilities and aptitudes necessary
15 to do most jobs, including, for example, walking, standing, sitting, lifting, pushing,
16 pulling, reaching, carrying or handling.'" *Smolen*, 80 F.3d at 1290 (quoting 20 C.F.R. §
17 140.1521(b)). An impairment or combination of impairments "can be found 'not severe'
18 only if the evidence establishes a slight abnormality having 'no more than a minimal
19 effect on an individual[']s ability to work.'" *Id.* (quoting *Yuckert v. Bowen*, 841 F.2d 303,
20 306 (9th Cir. 1988) (adopting Social Security Ruling "SSR" 85-28)).

22 At Step Two, the ALJ found that plaintiff has one severe impairment --migraine
23 headaches. AR. 17. The ALJ found that plaintiff's "medically determinable mental
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1 impairments of depression, anxiety and alcohol dependence, considered singly and in
2 combination do not cause more than minimal limitation in the claimant's ability to
3 perform basic mental work activities and are therefore nonsevere." AR. 17. In making
4 this determination, the ALJ identified that plaintiff had mild limitations in activities of
5 daily living, social functioning, concentration, persistence and pace, and with no episodes
6 of decompensation. AR. 17-18.

7 Plaintiff argues that this finding is contrary to plaintiff being diagnosed with
8 anxiety, depression, memory loss, amnesia, restlessness, difficulty controlling worry,
9 irritability, sleep disturbance and difficulty concentrating. Dkt. 9 at 5 (citing AR. 263,
10 280, 309, 319, 595, 662). It is true that Dr. Jennifer Smith, M.D., an acceptable medical
11 source, diagnosed plaintiff with depression and generalized anxiety disorder. AR. 321,
12 595. Ms. Christie Heany, PA-C diagnosed plaintiff with memory loss and amnesia, AR.
13 284-286, and therapist, Ms. Corn, diagnosed plaintiff with depression and noted that
14 plaintiff had difficulty concentrating. AR. 642, 662.

16 However, even if the ALJ erred in his Step Two finding, plaintiff has failed to
17 show why such an error is not harmless. *See Molina v. Astrue*, 674 F.3d 1104, 1111 (9th
18 Cir. 2012) (quoting *Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) ("'[T]he burden of
19 showing that an error is harmful normally falls upon the party attacking the agency's
20 determination.' ")). Plaintiff has not cited to any objective evidence in the record
21 establishing that her depression and anxiety caused any work-related limitations.
22 Although plaintiff argues that there is "ample evidence" of plaintiff's mental health-
23 related impairments, none of plaintiff's providers, including Dr. Smith, Ms. Heany, or

1 Ms. Corn, made any observations or stated an opinion on how plaintiff's depression and
2 anxiety would impact her ability to obtain or sustain full-time employment. *See* AR. 284-
3 286, 321, 595, 642. At the hearing, the vocational expert testified that *if* plaintiff was
4 limited to simple, routine, repetitive tasks, she could not perform her past relevant work,
5 AR. 46-47, however, plaintiff has not cited to any objective evidence in the record
6 establishing that she *is* limited to simple, routine or repetitive tasks. As a result, plaintiff
7 fails to offer any explanation nor has she cited to any evidence in the record to establish
8 her depression and anxiety would impair her ability to function under the limitations
9 included the ALJ's RFC.

10 It is plaintiff's duty to show her depression and anxiety had more than a minimal
11 effect on her ability to perform work duties. As such, any error in the ALJ's assessment
12 of Step Two and the RFC was harmless. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir.
13 2007); *Hickman v. Comm'r Soc. Sec. Admin.*, 399 F. App'x 300 (9th Cir. 2010) (finding
14 failure to include reading disorder as one of claimant's severe impairments at step two
15 harmless because there was substantial evidence in the record that reading disorder would
16 not have precluded claimant from work); *Collins v. Astrue*, 2009 WL 112863, at *5
17 (W.D. Wash. Jan.14, 2009) (error harmless "because there is no medical evidence in the
18 record that plaintiff's headaches caused him any work-related limitations").

19
20 **(2) Whether the ALJ erred in evaluating plaintiff's subjective symptom
21 testimony.**

22 Next, plaintiff argues that the ALJ erred in evaluating plaintiff's subjective
23 symptom testimony by relying on an unsuccessful work attempt to establish that plaintiff
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1 can perform her past relevant work. Dkt. 9 at 7-10.

2 Plaintiff testified that she was unable to work due to her anxiety and depression,
3 and that she has difficulties with concentration, focus, and memory. AR. 39-41. Plaintiff
4 testified that she has headaches “[q]uite often....a couple times a week[,]” and that she
5 experiences migraines once in a while. AR. 43-44.

6 The ALJ found that plaintiff’s statements were not consistent with the medical
7 evidence, and the other evidence in the record. AR. 20. Specifically, the ALJ reasoned
8 that: (1) plaintiff’s testimony was inconsistent with the objective medical evidence; (2)
9 plaintiff only sought minimal treatment; (3) plaintiff’s testimony was inconsistent with
10 her daily activities; (4) plaintiff received unemployment benefits during the period at
11 issue; and (5) plaintiff’s testimony was inconsistent with her work history; and AR. 21-
12 23.

14 Here, plaintiff only challenges one of the numerous reasons the ALJ gave for
15 discounting plaintiff’s testimony, that the ALJ erred in relying on plaintiff’s unsuccessful
16 work attempt to establish that plaintiff can perform her past relevant work. Dkt. 9 at 7-10.
17 Plaintiff does not challenge the ALJ’s remaining reasons for rejecting her subjective
18 symptom testimony. *See id.*

19 Defendant argues that even if not all of the ALJ’s reasons for discrediting
20 plaintiff’s allegations are proper, the ALJ’s decision should be upheld, as long as
21 substantial evidence supports the ALJ’s determination. Dkt. 10 at 15 (citing *Carmickle v.*
22 *Comm’r Soc. Sec.*, 533 F.3d 1155, 1162 (9th Cir. 2008)).

1 The ALJ's determinations regarding a claimant's statements about limitations
2 "must be supported by specific, cogent reasons." *Reddick v. Chater*, 157 F.3d 715, 722
3 (9th Cir. 1998) (citing *Bunnell v. Sullivan*, 947 F.2d 341, 343, 346-47 (9th Cir. 1991) (*en
4 banc*)). In evaluating a claimant's allegations of limitations, the ALJ cannot rely on
5 general findings, but "must specifically identify what testimony is credible and what
6 evidence undermines the claimant's complaints." *Greger v. Barnhart*, 464 F.3d 968, 972
7 (9th Cir. 2006) (quoting *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th
8 Cir. 1999)); *Reddick*, 157 F.3d at 722 (citations omitted); *Smolen*, 80 F.3d at 1284
9 (internal citation omitted).

10 The determination of whether or not to accept a claimant's testimony regarding
11 subjective symptoms requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929;
12 *Smolen*, 80 F.3d at 1281-82 (citing *Cotton v. Bowen*, 799 F.2d 1407-08 (9th Cir. 1986)).
13 First, the ALJ must determine whether or not there is a medically determinable
14 impairment that reasonably could be expected to cause the claimant's symptoms. 20
15 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82. If an ALJ rejects the
16 testimony of a claimant once an underlying impairment has been established, the ALJ
17 must support the rejection "by offering specific, clear and convincing reasons for doing
18 so." *Smolen*, 80 F.3d at 1284 (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993));
19 *see also Reddick*, 157 F.3d at 722 (citing *Bunnell*, 947 F.2d at 343, 346-47).
20

21 Although two of the ALJ's reasons for rejecting plaintiff's subjective symptom
22 testimony are not proper, the Court upholds the ALJ's decision because the ALJ has
23 provided four other clear and convincing reasons supported by substantial evidence.
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1 | *Carmickle*, 533 F.3d at 1162 (when ALJ provides specific reasons for discounting
2 | claimant's credibility, decision may be upheld even if certain reasons were invalid as long
3 | as "remaining reasoning and ultimate credibility determination" were supported by
4 | substantial evidence (emphasis omitted)). The Court first discusses the ALJ's two
5 | erroneous reasons for rejecting plaintiff's subjective symptom testimony, followed by the
6 | four valid reasons that are supported by substantial evidence.

7 A. Minimal Treatment - Anxiety and Depression

8 | The ALJ found that that the record shows no history of psychiatric hospitalization
9 | and minimal mental health treatment, which suggests that plaintiff's mental health
10 | impairments are not as serious as alleged. AR. 22. Plaintiff has not challenged this
11 | finding. *See* Dkt. 9.

13 | An ALJ may properly rely on evidence which shows "an unexplained, or
14 | inadequately explained, failure to seek treatment or follow a prescribed course of
15 | treatment" to discount a plaintiff's statements. *Fair*, 885 F.2d at 603; *see* SSR 96-7p 1996
16 | SSR LEXIS 4, *21-22 ("the individual's statements may be less credible if the level or
17 | frequency of treatment is inconsistent with the level of complaints. . . . and there are no
18 | good reasons for this failure").

19 | However, the ALJ's finding is not supported by substantial evidence. In June
20 | 2015, plaintiff presented to the emergency department for overdose of her depression
21 | medication (Celexa) and was admitted to inpatient psychiatric care. AR. 425-436.
22 | Plaintiff also sought regular mental health counseling with Ms. Corn for over a year
23 | between December 2014 and February 2016. AR. 637-665. Therefore, the Court

1 concludes that the ALJ erred in finding that plaintiff did not have any history of
2 psychiatric hospitalization and minimal mental health treatment. *See Carmickle*, 533
3 F.3d at 1162.

4 B. Unemployment Benefits

5 The ALJ also erroneously relied on plaintiff's reports that she collected
6 unemployment benefits during the relevant time period, the third and fourth quarter of
7 2013. AR. 22 (citing AR. 143). The Court is mindful that a claimant's receipt of
8 unemployment benefits could be a legally sufficient reason to find a plaintiff not credible
9 if it evidenced that the plaintiff considered himself capable of work and held himself out
10 as available for work. *See Copeland v. Bowen*, 861 F.2d 536, 542 (9th Cir. 1988).
11 However, a plaintiff's receipt of unemployment benefits does not necessarily constitute a
12 legally sufficient reason for an adverse credibility determination when the record "does
13 not establish whether [the claimant] held himself out as available for full-time or part-
14 time work." *See Carmickle*, 533 F.3d at 1161–62; *Mulanax v. Comm'r of Soc. Sec.*
15 *Admin.*, 293 Fed. Appx. 522, 523 (9th Cir. 2008) (receipt of unemployment benefits that
16 were payable to applicants available for temporary or part-time jobs was not necessarily
17 inconsistent with a claim of disability under the Social Security Act).

18 Here, although the record does contain evidence that plaintiff received
19 unemployment benefits, AR. 143, the record does not provide any context for that
20 evidence. The record does not contain plaintiff's unemployment benefits application, does
21 not specify whether plaintiff claimed that she was available for full-time or part-time
22 work, and does not otherwise specify the basis for any application for unemployment
23 work, and does not otherwise specify the basis for any application for unemployment
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1 benefits. *See* AR. 143. Accordingly, the Court finds that the evidence in the record that
2 plaintiff received unemployment benefits in 2013 does not give rise to a legally sufficient
3 reason on which the ALJ could properly rely in support of his adverse credibility
4 determination. *See, e.g., Plummer v. Colvin*, 2014 WL 7150682, at *16 (D. Az. Dec. 16,
5 2014) (claimant's receipt of unemployment benefits was not clear and convincing reason
6 for ALJ's adverse credibility determination where the record did not contain the
7 unemployment benefits application nor establish the manner in which claimant held
8 herself out as available for work in completing any such application); *Wood v. Colvin*,
9 2014 WL 4407719, at *9 (E.D. Wash. Sept. 8, 2014) (same where record contained no
10 certification by claimant that he was physically and mentally able to work full-time).
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12 **Harmless Error**

13 Although the ALJ erred in his reliance on plaintiff's minimal mental health
14 treatment and plaintiff's unemployment history, any such errors are harmless, because the
15 ALJ has provided at least four clear and convincing reasons supported by substantial
16 evidence for rejecting plaintiff's subjective symptom testimony. *Molina*, 674 F.3d at
17 1115; *see Carmickle*, 533 F.3d at 1162 (when ALJ provides specific reasons for
18 discounting claimant's credibility, decision may be upheld even if certain reasons were
19 invalid as long as "remaining reasoning and ultimate credibility determination" were
20 supported by substantial evidence (emphasis omitted)). As discussed below, these
21 reasons alone provide clear and convincing rationale supported by substantial evidence in
22 the record for the ALJ's failure to credit fully plaintiff's allegations.
23

1 C. Minimal Treatment - Migraine Headaches

2 The ALJ found that the record shows minimal treatment related to plaintiff's
3 migraines and headaches, which "suggests that the alleged persistence and intensity of
4 her symptoms are not as serious as alleged." AR. 22. Plaintiff has not challenged this
5 finding. *See* Dkt. 9.

6 Although the ALJ failed to cite to specific evidence in his discussion of plaintiff's
7 testimony, the ALJ previously detailed plaintiff's treatment history. AR. 20-21. The
8 evidence reflects that plaintiff did not seek treatment for her migraines or headaches after
9 April 2013, at which time it appears her symptoms subsided. AR. 267-70, 273, 311, 319-
10 325, 330, 361, 594, 610. *Fair*, 885 F.2d at 603 (An ALJ may properly rely on evidence
11 which shows "an unexplained, or inadequately explained, failure to seek treatment or
12 follow a prescribed course of treatment" to discount a plaintiff's statements.); *see* SSR
13 96-7p 1996 SSR LEXIS 4, *21-22.

15 The Court notes that plaintiff does not allege that she lacked medical insurance,
16 lacked access to affordable care at any point during the relevant period. *Carmickle*, 533
17 F.3d at 1162 (The ALJ only errors in discrediting the claimant for a failure to seek greater
18 treatment when the claimant "has good reason for not" seeking treatment, such as a lack
19 of insurance coverage, which the ALJ fails to consider.). Thus, the ALJ's finding that
20 plaintiff's lack of treatment for migraine headaches suggests that her symptoms are not as
21 serious as alleged is supported by substantial evidence.

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1 D. Inconsistent with Objective Evidence

2 The ALJ also noted a number of inconsistencies between plaintiff's testimony and
3 the objective medical evidence, which are not disputed by plaintiff. AR. 22. Determining
4 a claimant's complaints are "inconsistent with clinical observations" can satisfy the clear
5 and convincing requirement. *Regennitter*, 166 F.3d at 1297; *see also Fisher v. Astrue*, 429
6 F. App'x 649, 651 (9th Cir. 2011). However, a claimant's pain testimony may not be
7 rejected "solely because the degree of pain alleged is not supported by objective medical
8 evidence." *Orteza v. Shalala*, 50 F.3d 748, 749-50 (9th Cir. 1995) (quoting *Bunnell*, 947
9 at 346-47; *see also Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001); *Fair v.*
10 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). The same is true with respect to a claimant's
11 other subjective complaints. *See Byrnes v. Shalala*, 60 F.3d 639, 641-42 (9th Cir. 1995).

13 Here, the evidence is contradictory as to whether plaintiff's testimony regarding
14 her inability to focus and concentrate is inconsistent with the objective evidence. The
15 ALJ discussed Ms. Heany's treatment notes which show that plaintiff had intact memory,
16 normal attention span and concentration. AR. 21 (citing AR. 258-275, 308-316, 590-
17 636). The ALJ also referenced the opinion of Dr. Lezlie Pickett, Ph.D., indicating that
18 plaintiff was able to follow simple and complex instructions, and had excellent
19 concentration and attention. AR. 21 (citing AR. 326-335). On the other hand, treatment
20 notes from Ms. Corn reflect that plaintiff has difficulty concentrating, AR. 662, and Ms.
21 Heany diagnosed plaintiff with memory loss and amnesia, AR. 284-286.

23 However, the Court cannot substitute its judgment for that of the ALJ where the
24 ALJ's interpretation constitutes a rational reading of the evidence. *See Parra v. Astrue*,

1 481 F.3d 742, 746 (9th Cir. 2007) (“Where the evidence can reasonably support either
2 affirming or reversing the decision, we may not substitute our judgment for that of the
3 Commissioner.”); *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (court may not
4 reverse a credibility determination where that determination is based on contradictory
5 or ambiguous evidence). Therefore, the Court concludes that the ALJ did not err in
6 finding that plaintiff’s allegations regarding her memory, concentration and attention
7 were inconsistent with the objective medical evidence. *See Thomas v. Barnhart*, 278
8 F.3d 947, 954 (9th Cir. 2002) (citing *Morgan*, 169 F.3d at 599, 601) (It is not the job of
9 the court to reweigh the evidence: If the evidence “is susceptible to more than one
10 rational interpretation,” including one that supports the decision of the Commissioner, the
11 Commissioner’s conclusion “must be upheld.”).

13 Regarding plaintiff’s migraine headaches, the ALJ relied on treatment notes
14 wherein plaintiff reported that she had not had a migraine in over a year, and that her
15 migraines “stopped one day.” AR. 21-22 (citing AR. 330, 361, 594). This is inconsistent
16 with plaintiff’s testimony that she has migraines once in a while and headaches “[q]uite
17 often....a couple times a week.” AR. 43-44. Therefore, Court concludes that the ALJ’s
18 finding that the objective medical evidence is inconsistent with plaintiff’s allegations of
19 migraines and headaches is based on substantial evidence in the record as a whole.
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21 E. Inconsistent with Daily Activities

22 Further, the ALJ relied on inconsistencies between plaintiff’s daily activities and
23 her testimony, which are not disputed by plaintiff. AR. 22. Inconsistencies between
24 symptom allegations and daily activities may act as a clear and convincing reason to

1 discount a claimant's credibility. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir.
2 2008); *Bunnell*, 947 F.2d at 346. The Ninth Circuit specified "the two grounds for using
3 daily activities to form the basis of an adverse credibility determination: (1) whether or
4 not they contradict the claimant's other testimony and (2) whether or not the activities of
5 daily living meet "the threshold for transferable work skills." *Orn v. Astrue*, 495 F.3d
6 625, 639 (9th Cir. 2007) (citing *Fair*, 885 F.2d at 603).

7 Here, the ALJ did not make any specific findings regarding the transferability of
8 plaintiff's activities of daily living to work skills or to any particular competitive
9 employment. *See AR. 22*. Therefore, plaintiff's activities of daily living can only entail a
10 valid rationale for failing to credit fully plaintiff's allegations and testimony if "they
11 contradict the claimant's other testimony." *See Orn*, 495 F.3d at 639 (citing *Fair*, 885
12 F.2d at 603). The ALJ noted that plaintiff had no problem with personal care, performed
13 household chores including preparing meals, cleaning, laundry and minor household
14 repairs, drove, shopped for groceries, played/cared for her grandchildren, and socialized
15 once a week. AR 22 (citing AR. 180-189, 594). While these activities do not necessarily
16 indicate that plaintiff is capable of performing full-time work, this evidence supports the
17 ALJ's inference that plaintiff is not as limited as alleged and contradicts her testimony
18 that she has memory deficiencies and cannot complete a task. *See AR. 39-41. Sample v.*
19 *Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982) (internal citation omitted) (The ALJ may
20 "draw inferences logically flowing from the evidence."); *Orn*, 495 F.3d at 639.
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1 Thus, the Court concludes that there is substantial evidence in the record as a
2 whole supporting the ALJ's finding that plaintiff's testimony is contradicted by her daily
3 activities.

4 F. Work History

5 Plaintiff contends that the ALJ erred in relying on plaintiff's unsuccessful work
6 attempt to support the finding that she can perform her past relevant work. Dkt. 9 at 8.
7 The ALJ found that plaintiff worked after the alleged onset date of disability as a
8 financial advisor from October 29, 2012 through February 20, 2013. AR. 22 (citing AR.
9 216, 232). Plaintiff reported that she worked 40 hours per week and that her duties
10 included managing guardianships and special needs trusts. AR. 22 (citing AR. 151).

12 The ALJ may consider work that a claimant engaged in—regardless of whether
13 that work amounted to substantial gainful activity—in making his disability
14 determination. SSR 96-7 (prior work and efforts to work are factors used to evaluate a
15 claimant's credibility); *see also* 20 C.F.R. §§ 404.1571, 416.971 (“Even if the work you
16 have done was not substantial gainful activity, it may show that you are able to do more
17 work than you actually did.”). “In weighing a claimant's credibility, the ALJ may
18 consider inconsistencies ... between his testimony and ... his work record” *Light v.*
19 *Soc. Sec. Admin.* 119 F.3d 789, 792 (9th Cir. 1997). The ALJ may also discount a
20 claimant's credibility where the alleged impairment is not the reason that the claimant
21 stopped working. *See Tommasetti*, 533 F.3d at 1040 (affirming credibility decision where
22 the claimant testified his diabetes was not disabling, was controlled by medication, and
23 was not the reason he stopped working); *Bruton v. Massanari*, 268 F.3d 824, 828 (9th
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1 Cir. 2001) (The plaintiff's pain allegations were not credible where the plaintiff reported
2 at the hearing and to his doctors that he left the job because he was laid off, not because
3 he was injured.). And the ALJ may discount a claimant's credibility where he or she has
4 continued to search for work as holding one's self out as capable of work "cast[s] doubt
5 on a claim of disability." *See Ghanim v. Colvin*, 763 F.3d 1154, 1165 (9th Cir. 2014).

6 To support her argument that the ALJ improperly relied on this work history,
7 plaintiff argues that the Administration determined that plaintiff's prior work activity was
8 an unsuccessful work attempt because she "had to stop working due to a medical
9 condition." Dkt. 9 at 7 (citing AR. 158). Plaintiff cites to a POMS policy that sets forth
10 the type of unsuccessful work attempts that do not preclude a finding of disability. Dkt. 9
11 at 8 (citing POMS DI 11010.145); *see also* SSR 84-25, 1984 WL 49799 at *2. However,
12 the purpose of the POMS policy is to describe situations in which a claimant's failed
13 efforts to return to work would not be considered "substantial gainful activity" at the first
14 step of the sequential evaluation. *See id.* The policy does not preclude consideration of
15 such work to the extent it may bear in determining whether or not to accept a claimant's
16 testimony regarding subjective symptoms.

17 Here, the ALJ found that plaintiff stopped working for reasons unrelated to
18 allegedly disabling impairments. AR. 22-23. The record supports the ALJ's finding. For
19 example, plaintiff testified that she stopped working because she was unable to use
20 Microsoft Excel in her job duties. AR. 38-39. This evidence supports the ALJ's finding,
21 suggesting plaintiff could have continued working in this position if she had experience
22 with Microsoft Excel. *See Bruton*, 268 F.3d at 828.

1 Plaintiff also reported looking for other work after she left her position in February
2 2013, reporting that she attempted to find work “by lowering my expectations and going
3 towards a less professional field, but no one would hire me because I was over qualified.
4 Or maybe there was age discrimination.” AR. 330. This evidence also supports the ALJ’s
5 finding, indicating that plaintiff continued to search for work and hold herself out as
6 capable of work, which “cast[s] doubt on a claim of disability.” *See Ghanim*, 763 F.3d at
7 1165.

8 While there is some evidence that plaintiff experienced anxiety about learning
9 Microsoft Excel, AR. 329-330 (plaintiff reported that she was “so full of anxiety” about
10 learning the required computer programs that she couldn’t focus and learn them), this is
11 not substantial evidence to overcome the ALJ’s finding. This evidence does not establish
12 that it was plaintiff’s anxiety that prevented her from learning Microsoft Excel and
13 succeeding at in her position, but rather, that she experienced some anxiety related to her
14 inability to learn the required program. Accordingly, the Court concludes that ALJ’s
15 finding that plaintiff’s work history undermines her testimony as to the disabling effects
16 of her impairments is supported by substantial evidence.

17 **(3) Whether the ALJ erred in evaluating the medical opinion evidence.**

18 Plaintiff argues that the ALJ erred in giving great weight to the opinion of Dr.
19 Pickett and giving little weight to the opinion of Ms. Corn. Dkt. 9 at 10-11.

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1 A. Dr. Pickett's opinion

2 On September 19, 2014, Dr. Pickett examined plaintiff. AR. 328. Dr. Pickett
3 opined that plaintiff was able to understand, recall and follow through on simple and
4 complex verbal tasks; tolerate change well; and track and respond to changes in
5 conversational direction without difficulty. AR. 332-334. Dr. Pickett opined that plaintiff
6 did not have any cognitive, memory, or mental health difficulties that would impede
7 progress towards future goals. AR. 332-334. Dr. Pickett opined that plaintiff was able to
8 maintain the pace and persistence of a regular work environment. AR. 334. The ALJ gave
9 great weight to Dr. Pickett's opinion, reasoning that Dr. Pickett examined plaintiff and
10 that her opinion was consistent with the clinical findings, including findings that plaintiff
11 could follow simple and complex directions accurately without any apparent hesitation or
12 difficulty, maintained excellent concentration and attention, and was polite, personable
13 and enjoyable to talk to. AR. 23.

15 Here, the Court finds no error in the ALJ's decision. The ALJ determined that Dr.
16 Pickett's opinion, which was based on her examination and testing of plaintiff, as well as
17 the medical record, *see* AR. 328, was entitled to great weight. The determination is
18 supported by substantial evidence, *see* AR 332-334, and therefore, must be upheld.
19 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (examining source's opinion
20 may constitute substantial evidence where based upon independent examination of
21 claimant).

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1 B. Ms. Corn's opinion

2 On December 26, 2014, Ms. Corn assessed plaintiff with a GAF score of 48. AR.
3 665. The ALJ gave Ms. Corn's opinion little weight because it was inconsistent with the
4 clinical findings and opinion of Dr. Pickett. AR. 23. The ALJ also found that it was not
5 evident whether the GAF score intended to rate symptoms or functioning, and that Ms.
6 Corn was not an acceptable medical source. AR. 23.

7 Even if the ALJ erred in giving little weight to the opinion of Ms. Corn, plaintiff
8 has not shown why such an error is harmful. An error is harmless only if it is not
9 prejudicial to the claimant or “inconsequential” to the ALJ’s “ultimate nondisability
10 determination.” *Stout*, 454 F.3d at 1055; *see Molina*, 674 F.3d at 1115. The determination
11 as to whether an error is harmless requires a “case-specific application of judgment” by
12 the reviewing court, based on an examination of the record made ““without regard to
13 errors’ that do not affect the parties’ ‘substantial rights.’” *Molina*, 674 F.3d at 1118-19
14 (quoting *Shinseki*, 556 U.S. at 407). “[T]he burden of showing that an error is harmful
15 normally falls upon the party attacking the agency's determination.’ ”. *See Molina*, 674
16 F.3d at 1111 (internal citation omitted).

17 Here, there is no indication from Ms. Corn that plaintiff was functionally limited
18 in any way. For example, although Ms. Corn opined that plaintiff had a GAF score of 48,
19 was depressed, and had difficulty concentrating, Ms. Corn did not state how these
20 symptoms translated into functional limitations or impacted plaintiff’s ability to maintain
21 or obtain employment. *See* AR 662. As a result, plaintiff fails to offer any explanation,
22 nor has she cited to any evidence in the record to establish that Ms. Corn believed her
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1 ability to function was more impaired than the ALJ found. It is plaintiff's duty to make
2 that showing. As such, any error by the ALJ here was harmless. *Lewis*, 498 F.3d at 911;
3 *Collins*, 2009 WL 112863 at *5.

4 CONCLUSION

5 Based on the stated reasons, and the relevant record, it is ORDERED that this
6 matter is **AFFIRMED** pursuant to sentence four of 42 U.S.C. § 405(g). **JUDGMENT**
7 should be for **defendant** and the case should be closed.

8 Dated this 6th day of July, 2018.

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12 J. Richard Creatura
13 United States Magistrate Judge
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